United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1754

No. 74-1754

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA, ex rel.
DAVID W. O'BROCTA,
Relator-Petitioner-Appellees,

vs.

COMMANDING OFFICER, United States Armed Forces, Examining and Entrance Station,

R. F. FROEHLKE, as Secretary of the Army,

and

SELECTIVE SERVICE SYSTEM, Local Board No. 88,
Respondents-Appellants.

APPELLEES' BRIEF

On Appeal from the United States District Court
for the Western District of New York.

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APPELLEES' BRIEF

I. ADDITIONAL STATEMENT OF THE CASE.

The petitioner concedes that the governments' statement of facts and regulations is generally accurate and complete. However, there are four (4) instances where the record, we believe, is not adequately presented.

First, on page six of the government's brief, there is no

mention that there was testimony by Charles Claar, Coordinator of the developmental study program at Genesee Community College, that the petitioner was enrolled in that program and that he was required to take one semester of non-credit courses before he could enter the regular two year program leading to an Associates degree (App. p. 38, 39).

Second, on page seven the government states, "Even if the Board had been informed that petitioner was in the program [i.e. a developmental or remedial course at Genesee Community College] they were not required to classify him II-S because of his failure to meet the requirements of "satisfactorily pursuing a full-time course of instruction." It is petitioner's position, that this statement is a conclusion of law and that the argument in Point C infra, will support the position that petitioner had a II-S claim that warranted de novo review by the Appeal Board.

Third, also on page seven, the government states, "Petitioner abandoned his request for a student deferment." Petitioner respectfully claims that the record shows the opposite, namely, that petitioner had continued his request for a student deferment throughout his dealings with Local Board No. 88. Petitioner's letter of November 2nd, 1970 (App. p. 70) asks, by necessary implication, for a change of his I-A draft classification on the

grounds both of his medical condition and his student status. The fact that the Local Board, at petitioner's personal appearance on December 22nd, 1970, also decided to retain the petitioner in a I-A classification because he was not entitled to a medical deferment, does not imply that the petitioner had abandoned his student claim (App. p. 77). The petitioner subsequently qualified for class I-S(c), a temporary student deferment (App. p. 17) and, thereafter the Selective Service record shows numerous entries reflecting petitioner's student claim. (App. pp. 88, 90, 93, 94, 96 and 98). We submit, therefore, that the District Court correctly found, "Petitioner's Selective Service file indicates that he consistently maintained he was entitled to a II-S classification." (App. p. 31).

Finally, the government's brief at pages nine to twelve through dubious inference and innuendo, would now seem to accuse petitioner of impropriety in his relations with governmental authorities. We believe that these implied aspersions are erroneous. The record clearly shows that the petitioner brought this civil action only after he met his responsibilities under the Selective Service Act and submitted to induction on December 27th, 1972. The United States Attorney must have been satisfied with the petitioner's good faith as late as October 26th, 1972, when the United States

Attorney wrote the petitioner's Local Board and requested that petitioner's induction be postponed. (App. p. 100). Given that the United States Attorney is amply endowed with prosecutorial power, the record would not seem to support the claim that the petitioner's actions were improper.

II. ARGUMENT

A) THE DISTRICT COURT PROPERLY FOUND THAT THE LOCAL BOARD HAD DENIED PETITIONER A SUBSTANTIAL PROCEDURAL RIGHT WHEN HIS APPEAL WAS NOT PROCESSED.

The record is clear and the government has conceded that Local Board No. 88 failed to process petitioner's appeal of November 2nd, 1970 (App. pp. 30, 71). The ramifications of this failure involve two issues, first the construction of 32 CFR §1626.41 regarding the processing of Selective Service appeals and, second, the curative effect of subsequent Board actions.

The pertinent part of 32 CFR §1626.41 reads as follows:

> "[Local Boards] shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the Appeal Board or during the period such appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the Local Board."

In United States v. Madrid, 314 F.Supp. 17 [W.D. Tex. 1968],

this section of the Selective Service Regulations was construed to mean that "...any order to report for induction which has been issued during the period an appeal is pending to the Appeal Board shall be ineffective and shall be cancelled by the Local Board." Madrid, 314 F. Supp. at 18. We submit that it was proper for the District Court below to rely on Madrid, not only because this is the fair and plain meaning of the regulation but also because there is sound, independent authority for the proposition "...that the right to review by the Appeal Board is absolute and that an order to report for duty while an appeal is pending, is invalid." United States v. Olkowski, 248 F.Supp. 660, 664 [W.D. Wisc. 1965]; Chih Chung Tung v. United States, 142 F.2d 919 [1st Cir. 1944].

In regard to the subsequent reclassifications of petitioner, we submit that the District Court was correct in finding that these actions did not cure the Local Board's original failure to process petitioner's appeal. The Court in Madrid found the kernel of the problem in facts analogous to petitioner's when it said:

> "...Clearly no action taken by [the] Board which failed to grant the defendant the full relief sought by him in his appeal could serve to interfere, defeat, or suspend his right to have his appeal ultimately determined de novo by the Appeal Board.

> In this connection when an appeal is filed the appeal sections of the regulations [§1626.1-1626.61] automatically set in motion certain mandatory procedures to be followed by the Selective Service System, and the Local Board is given no authority by §1626.2 [b] or any other regulation found or cited by this Court to circumvent or thwart a registrant's right to pursue his administrative remedies uninterruptedly to the end." Madrid, 314 F. Supp. at 19.

The application of this holding to the petitioner is manifest. Petitioner should have had the opportunity to have the denial of his II-S claim reviewed by the Appeal Board immediately after the adverse decision by the Local Board on December 22nd, 1972. We submit that the Local Board's failure to perfect the appeal deprived the petitioner of his right to an orderly and uninterrupted review of his claim. At the time when the Board denied petitioner's claim he had exhausted his administrative remedies because he had concededly requested an appeal. The only response the petitioner received from the Board was the denial of his claim [SSS Form 110, sent December 23rd, 1970, App. p. 57], and an order to report for induction. (App. p. 78). It is respectfully submitted that it is fair to infer that the petitioner could have concluded that these notices were a definitive statement by the Selective Service that petitioner was not entitled to a II-S deferment. In other words,

it is a valid inference to say the petitioner was misled to believe that he was foreclosed from raising his II-S claim again, or in any event that it would have been a useless act for him to raise it again. When the Selective Service System misleads a registrant concerning a substantial procedural right, this alone justifies the invalidation of subsequent induction orders. United States v. Jacques, 463 F.2d 653 [1st Cir. 1972]. We submit, therefore, that the rationale in Madrid is sound and was properly applied by the District Court below.

B) IT IS THE GOVERNMENT'S BURDEN TO SHOW THAT THE PETITIONER WAS NOT PREJUDICED BY THE LOCAL BOARD'S FAILURE TO PERFECT THE APPEAL.

The government contends that the petitioner has the burden of proving prejudice from the Local Board's error, citing United States v. Chaudron, 425 F.2d 605 [8th Cir. 1970], cert. den'd., 400 US 852 [1970]. We respectfully submit that Chaudron is not apposite to petitioner's situation and it proclaims a rule of law which this Court should not adopt in this case.

The Local Board error at issue in Chaudron involved some tenuous irregularities in the Selective Service System's procedure for assigining alternative work positions to a consciencious objector under 32 CFR, Sections 1660.20 (a) and (b). The conceded error in petitioner's case is transparently and funda-

mentally different. The petitioner was deprived of "[t]he right to an administrative appeal [which] is an essential procedural right, not only to the registrant but also to the Selective Service System. (Mulloy v. United States, 398 US 410 [1970])." (Appellants' brief at page 19). We submit that when so basic a guarantee as the right to appeal is abbrogated, then Chaudron is simply not pertinent.

A more relevant and, we suggest, a better rule is stated in Jacques, supra,

> "...[T]he importance of the right of appeal cannot be minimized. Moreover, appellant need not specify how he would have used these rights or how such use would have aided his cause in order to complain of the deprivation. Simmons v. United States, 348 US 397, 406, 75 S.Ct. 397, 99 L.Ed. 453 [1955]. Once a registrant has shown deprivation of a substantial procedural right, the burden rests on the Government to show absence of prejudice beyond a reasonable doubt. United States v. Woloszczuk, 458 F.2d 1255 [1st Cir. 1972]; United States v. Fisher, 442 F.2d 109 [7th Cir. 1971]." 463 F.2d at 659.

It is petitioner's position, therefore, that the government has a special burden to prove that the petitioner was not prejudiced by the Local Board's failure.

C) THE GOVERNMENT HAS NEITHER DISPELLED THE AURA OF PREJUDICE, NOR HAVE THEY CONCLUSIVELY REFUTED CLAIMS OF ACTUAL PREJUDICE ARISING FROM THE LOCAL BOARD'S FAILURE TO PROCESS THE APPEAL.

The Local Board's malfeasance has harmed the petitioner,

1) by depriving petitioner of a de novo appellate review of his II-S claim which warranted such review,

2) by depriving petitioner of other classifications which he might have had if the Local Board had acted properly, and,

3) by allowing the petitioner to believe that further efforts to obtain a II-S deferment would have been fruitless.

(1.) In the fall of 1969 petitioner began studies at a two year college and was given a II-S deferment for that year. (App. pp. 57, 67). In the fall of 1970, petitioner was in his third semester at the college. The Selective Service file shows that petitioner's expected graduation date was two semesters hence. (App. p. 66). In other words, it would take the petitioner five semesters or two and one-half academic years to earn his degree. The petitioner was one semester out of phase with some of the other two-year students because he was required to complete a one semester developmental or remedial program which was not applied to the credit requirements for the two-

year degree program. (App. p. 38). The Local Board was informed of these circumstances by the petitioner (App. p. 71), and by the school. (App. pp. 14-25). The Local Board declined to give petitioner a II-S deferment. We argue that petitioner had a meritorious claim which should have been reviewed by the Appeal Board because the petitioner was in fact satisfactorily pursuing a full-time course of study under 32 CFR §1622.25 (c).[1]

The "satisfactorily pursuing" requirement as defined in 32 CFR §1622.25 (c) is a pro rata formula whereby the registrant is to complete credit requirements commensurately with the academic timetable for the completion of a degree. In petitioner's case, we submit that the academic timetable was in fact five semesters, and that in the fall of 1970 petitioner was in his third semester where he properly should have been. Thus, we believe, petitioner

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[1] 32 CFR §1622.25 describes the conditions for obtaining and retaining a II-S classification. Paragraph (c) of this section provides: a student shall be deemed to be "satisfactorily pursuing a full-time course of instruction" when, during his academic year, he has earned, as a minimum, credits towards his degree which, when added to any credits earned during prior academic years, represent a proportion of the total number required to earn his degree at least equal to the proportion which the number of academic years completed bears to the normal number of years established by the school to obtain such a degree. For example, a student pursuing a four year course should have earned twenty-five per cent of the credits required for his baccalaureate degree at the end of his first academic year, fifty per cent at the end of his second academic year, and seventy-five per cent at the end of his third academic year.

was satisfactorily pursuing his studies.

Coleman v. Tolson, 435 F.2d 1062 [4th Cir. 1970] is germane. In Coleman, the registrant took three semesters to complete his first year but was certified by his school that he was satisfactorily pursuing a full-time course of instruction. On those facts the Court held that denial of a II-S deferment was improper on the grounds that the pro rata formula in 32 CFR 1622.25 (c) only establishes a "convenient administrative presumption". Coleman, 435 F.2d at 1064. Moreover, the Court held that the formula cannot be so negatively construed in all fact situations such as to justify a denial of a II-S deferment when the formula is not literally complied with by the registrant.

Mulford v. Commanding Officer, 338 F.Supp. 1120 (E.D.N.Y. 1970) is also pertinent. There the registrant was out of phase with the ordinary four year academic program because of a curriculum change after the start of his studies. The Court held that the denial of a II-S deferment was improper because 32 CFR 1622.25 (c) "...was not intended to deny student deferments where undergraduate programs do not conform to the conventional four years." Mulford, 385 F.Supp. at 1123.

If a curriculum change well after the start of the academic program should not deprive a student of a II-S deferment, then,

a fortiori, the petitioner should not have been deprived of a deferment when the extra semesters were the very condition upon which the petitioner entered his studies.

(2.) Another harm occasioned by the Local Board's error, was to deny petitioner the benefit of a I-S(c) temporary student deferment. Under 32 CFR §1622.15 (b) one of the requirements for a I-S(c) deferment is that there be an outstanding induction order.[2] Since the induction order of January 25th, 1971 was concededly invalid, it follows that the petitioner's I-S(c) classification of February 1st, 1971 was also invalid in that

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[2]§1622.15, Class I-S: Student deferred by statute.

(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I-S under the provisions of this provisions of this paragraph.

(1) who has previously been placed in Class I-S thereunder or

(2) who has been deferred as a student in Class II-S and has received his baccalaureate degree.

A registrant who is placed in Class I-S under the provision of this paragraph shall be retained in Class I-S

(1) until the end of his academic year or

(2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier.

The date of the classification in Class I-S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form 102) and be identified on that record as Class I-S(c).

[E.O. 10292, 16 F.R. 9862, Sept. 28, 1951, as amended by E. O. 11360, 32 F.R. 9790, July 4, 1967].

one of the statutory requirements was absent, namely, a valid outstanding induction order. Consequently, we urge that the petitioner was entitled to a valid I-S(c) deferment at some later stage of his schooling because he theretofore had never been validly classified I-S(c).

We make this argument to show, among other things, that there are hypothetical situations depending upon hypothetical actions of the Selective Service System such that the petitioner could have found himself in a deferred status or otherwise not subject to induction on the very day he filed his petition.

(3.) Finally, as we outlined in Point A above, it is our contention that petitioner was actively misled by the Local Board when they failed to process the appeal. We believe that this patent harm was the very cause of petitioner's subsequent troubles with the Selective Service.

The respondents would apparently argue that the illegal failure to process the petitioner's II-S appeal was somehow made right by later opportunities to appeal entirely different classifications. For these later opportunities to have any curative value, it must be assumed that the petitioner knew that the Local Board did not forward the II-S claim and that the

Appeal Board never decided the question. We submit that the petitioner did not know nor could he be reasonably expected to know that the Local Board egregiously failed to carry out their responsibilities. We submit that unless the Local Board had fully apprised the petitioner of their error and the consequences therefrom, then any attempt to impute responsibility to the petitioner for not correcting that error amounts to a classic case of legalistic sandbagging.

CONCLUSION

For the reasons stated herein we respectfully submit that the decision of the District Court should be affirmed.

Respectfully submitted,

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United States
Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: United States, ex rel David W. O'Brocta
v. Commanding Officer, etc., et al
No. 74-1754

Gentlemen:

Enclosed please find twenty-five (25) copies of Appellees' brief in regard to the above-captioned matter.

We have on this date served two (2) copies of this brief upon the United States Attorney for the Western District of New York, Appellants.

Very truly yours,

DOYLE, DIEBOLD & BERMINGHAM

by Joseph D. Bermingham

JOSEPH D. BERMINGHAM, JR.

JDB:dw
Enclosures